Professional Porter & Window Cleaning Co., Division of Propoco, Inc. and Margaret Bailey. Case 29-CA-8144

August 4, 1982

DECISION AND ORDER

On June 18, 1981, Administrative Law Judge James F. Morton issued the attached Decision in this proceeding. Thereafter, counsel for the General Counsel filed exceptions and a supporting brief, and Respondent filed a reply to the exceptions of the General Counsel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge only to the extent consistent herewith.

The Administrative Law Judge found that Respondent did not violate the Act by discharging employee Margaret Bailey because of the letter which she wrote to the administrator of the Brookhaven Beach Health Related Facility. We find merit in the General Counsel's exceptions, and for the reasons below we find that Bailey's discharge violated Section 8(a)(1) of the Act.

As noted by the Administrative Law Judge, Brookhaven's management agreed in June 1979 to have Respondent provide the cleaning services which had previously been performed by Brookhaven's own maids and porters. Following this agreement, many of Brookhaven's maids and porters became employees of Respondent, and they continued to be represented by the Union as they had been while in Brookhaven's employ. Soon thereafter, employees Bailey and Mary Giles complained to Supervisor Mary Ann Corino that Respondent was supplying the maids with soft brushes and weak, ineffective cleaning solutions which made their work more difficult. They contended that the firmer brushes and stronger solutions which Brookhaven had formerly supplied had required them to expend less effort.

Bailey and Giles were also displeased with the manner in which they were supervised by Corino. As noted by the Administrative Law Judge, Bailey testified that Corino "stood over" the maids and criticized them as if they were children. According to Bailey, complaints to the Union would bring a temporary relaxation of the pressure from Corino, but after a few days the problem would resurface.

In May 1980, Corino informed the maids that they would subsequently be required to mop the bathroom floors, a task formerly performed exclusively by the porters. However, the Administrative Law Judge found no evidence that the maids were ever actually required to perform this work.

On June 23, 1980, Bailey wrote the following letter to Mr. H. Rothman, the administrator of Brookhaven:

Dear Sir:

The Housekeeping Dept. feels that it is time for you to be made conscious of the fact that this facility is deteriorating.

The Professional Porter Service Company has done nothing to enhance the interior of this facility.

The Professional Porter Service Company has taken everything away from the House-keeping Dept. that is needed to clean the facility with. The products that are used now have been diluted with so much water that [they are] no good.

The Professional Porter Service Company is making the hallways, the dining area, and the day-room floors look good, but the floors are not really being cleaned.

Now on top of all the dirt and the germs, Professional Porter Service Company is demanding that the maids do the porter's work, and the porters do the maid's work.

Mr. Rothman, this is very humiliating to the Housekeeping Dept, and to the facility. So when you are in the facility again, just take a good long look at what the Professional Porter Service Company is doing to your facility.

Again, we feel that it is our duty to inform you of the situation before it is too late.

Bailey, Giles, and eight other maids signed the letter, which Bailey presented to Rothman. Rothman subsequently informed Respondent's president that if Respondent could not handle its internal affairs he would replace it with another company. Respondent then sought to have Bailey apologize for the letter, and Bailey was discharged when she refused to do so. Bailey filed a grievance, but an arbitrator found that she had been discharged for cause.

1. The Administrative Law Judge concluded that the arbitration award was consonant with the policies of the Act, and he dismissed the complaint in deference to it, finding that the arbitrator had considered the issue of whether the letter reached the level of public disparagement necessary to have deprived Bailey of the protections of the Act. We find, in agreement with the General Counsel's exceptions, that deferral is inappropriate under the circumstances of this case.

The Board has held that it will not honor the results of an arbitration proceeding unless the unfair labor practice issue involved was both presented to

and considered by the arbitrator. Here, as noted by the Administrative Law Judge, the attorney who represented the Union in the arbitration proceeding testified that he submitted no evidence to the arbitrator on whether Bailey's discharge was an unfair labor practice. He also testified that the issue was not litigated in any respect in that proceeding, and he indicated that his only contention was that Bailey's discharge was discriminatory in view of Respondent's failure to impose discipline upon the other employees who signed the letter. Although the attorney did provide the arbitrator with a copy of the Board's complaint, he testified that he did so only to prevent the arbitrator from drawing an adverse inference from a determination by the Division of Unemployment Compensation of the State of New York that Bailey's discharge had been for

As the Administrative Law Judge found, the arbitrator conceded that the complaint in the instant proceeding was not before him for determination. arbitrator's decision also states "[a]lthough [Bailey] was afforded a full opportunity to present every phase of her case, surprisingly, other than the NLRB documentation referred to. she did not mention or was it even suggested in her presentation, that she was discharged because she had 'joined or assisted the Union' or had 'engaged in other concerted activity for the purpose of collective bargaining." Nonetheless, the arbitrator concluded that Bailey was not discharged because of union activity or any other conduct protected by the Act.

In view of the foregoing, we conclude that the unfair labor practice issue before us was neither presented to nor considered by the arbitrator. In the latter regard, we find that the arbitrator's gratuitous statement that Bailey was not discharged for protected activity does not indicate any real consideration of the statutory issue.² Accordingly, we decline to defer to the arbitrator's award.³

We are unpersuaded by Chairman Van de Water's criticism of our adherence to Suburban Motor Freight's requirements that the statutory issue be both presented to and considered by the arbitrator. The Chairman states that once the arbitral forum has been invoked "the grievant should be required to raise any statutory issues before the arbitrator or be precluded from subsequently raising them before the Board." In essence, the Chairman urges a return to the rule of Electronic Reproduction Service Corporation, et al.4 which the Board expressly overruled in Suburban Motor Freight. In the latter case, we stated that "[t]he Board can no longer adhere to a doctrine which forces employees in arbitration proceedings to seek simultaneous vindication of private contractual rights and public statutory rights, or risk waiving the latter."5

We adhere to the established position in Suburban Motor Freight that the Board will not defer in situations where it determines that the statutory issue either was not presented to or was not considered by the arbitrator. A grievant may choose to challenge disciplinary action solely on the ground that discipline invoked for the stated offense was inconsistent with the employer's past practice or otherwise violated contractual provisions unrelated to the Act. The election to proceed in the contractually created arbitration forum provides no basis. in and of itself, for depriving an alleged discriminatee of the statutorily created forum for adjudication of unfair labor practice charges. The Chairman would compel such a grievant to forfeit the right to a Board disposition where, as here, an arbitrator has found only that the employer's action was consistent with its past practice, but has not addressed the issue of whether the real motivation for the discipline was to retaliate against protected union or other concerted activity. In a case where such an alleged action could, if litigated, be proved valid, deferral to the arbitration award on the procedural basis urged by the Chairman would make a mockery of the critical Spielberg requirement that an arbitration award not be "clearly repugnant to the purposes and policies of the Act," if it is to be de-

¹ Suburban Motor Freight, Inc., 247 NLRB 146 (1980); also see Airco Industrial Gases—Pacific, a Division of Air Reduction Company, Incorporated, 195 NLRB 676 (1972); and Raytheon Company, 140 NLRB 883 (1963).

In this connection we also find that the arbitrator's characterization of Bailey's letter as being "libelous" and "akin to extreme insubordination" is not equivalent to a finding of disparagement or disloyalty such as to render Bailey's conduct unprotected under the Act. We note that the arbitrator considered none of the issues, discussed infra, which arise in connection with the issue of disparagement. We also note that, in discussing his findings, the arbitrator asserted that Bailey would have to be ready to "prove [the] validity" of the charges in the letter or "suffer the penalty of dismissal." As discussed infra at fn. 12, whether a statement is protected under the Act is not determined by its truth or falsity.

³ Under the circumstances, we perceive no need to venture an opinion whether deferral would have been appropriate if the unfair labor practice issue had been presented to and considered by the arbitrator in making his award. Consequently, we shall not respond to Chairman Van de Water's statement in his dissent that the award was not clearly repugnant to the Act. We note, however, the irony of the Chairman's heavy reliance on the Third Circuit's decision in N.L.R.B. v. Pincus Brothers. Inc.-

Maxwell, 620 F.2d 307 (1980). In a subsequent case, N.L.R.B. v. General Warehouse Corporation, 643 F.2d 965 (1981), the Third Circuit distinguished Pincus Brothers and specifically endorsed, as a prerequisite to the Spielberg standards, the Board's requirement that the arbitrator must have considered and ruled on the statutory issue involved in a grievance. See also, e.g., Hammermill Paper Company v. N.L.R.B., 658 F.2d 155 (3d Cir. 1981); St. Luke's Memorial Hospital, Inc. v. N.L.R.B., 623 F.2d 1173, 1178-79 (7th Cir. 1980); N.L.R.B. v. Davol, Inc., 597 F.2d 782, 786 (1st Cir. 1979); Bloom v. N.L.R.B., 603 F.2d 1015, 1020 (D.C. Cir. 1979); Stephenson v. N.L.R.B., 550 F.2d 535 (9th Cir. 1977); The John Klann Moving and Trucking Company v. N.L.R.B., 411 F.2d 261, 263 (6th Cir. 1969), cert. denied 396 U.S. 833; and Illinois Ruan Transport Corporation v. N.L.R.B., 404 F.2d 274, 280 (8th Cir. 1968).

^{4 213} NLRB 758 (1974).

^{5 247} NLRB at 146-147.

ferred. Such a peremptory analysis of the repugnancy issue demonstrates that it is the Chairman, not the majority, that endorses a radical departure from *Spielberg*.

The Chairman also criticizes Suburban Motor Freight for lacking "clarity" and for creating the problem of "how thoroughly the statutory issue has to be presented." This problem, to the extent it exists, will be no greater in the context of arbitration proceedings than when presented in the context of summary judgment proceedings, motions for reconsideration, or unfair labor practice proceedings relevant to conduct not specifically alleged as unlawful in a complaint. In any event, the Chairman's solution to the problem subverts the Act by requiring, rather than merely permitting, simultaneous litigation of all issues before an arbitrator. Because parties may be justifiably unwilling to try the statutory question before private tribunals neither charged with nor experienced in interpreting the Act, the single-forum litigation requirement might actually discourage resort to contractual grievance and arbitration proceedings. This result would fly in the face of the Board's statutory mandate to promote the private resolution of collective-bargaining disputes.

The Chairman further asserts that, absent evidence to the contrary, the Board should assume that arbitrators have considered the unfair labor practice issues presented to them. Here, of course, we have found that the statutory issue was not even presented. In any event, we decline the invitation to engage in unsupported speculation concerning the substance of arbitration proceedings. The gravity of the Board's statutory obligation to protect specified rights of employees, employers, and labor organizations justifies requiring the party seeking deferral to prove that the statutory issue has been litigated.

Finally, we reject Member Hunter's view that Suburban Motor Freight's requirements are satisfied whenever the contractual and unfair labor practice issues are factually parallel and the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice issue. Merely considering the relevant facts does not necessarily lead to consideration of the statutory issue. Here, for instance, the contractual issue is whether Bailey was discharged for just cause, while the statutory issue

is whether Bailey's letter constituted protected concerted activity or unprotected disparagement. Although a single set of facts is involved, the difference in the legal issues is most vividly illustrated by the arbitrator's statement that Bailey would have to "prove [the] validity" of her charges or "suffer the penalty of dismissal." As discussed infra, the Board does not determine the protected character of a statement according to whether it is true or false. In view of the contract issue defined by the arbitrator, the arbitrator's recognition that the Board's complaint was not before him, and the undisputed fact that Bailey made no statutory arguments at the arbitration proceeding, we cannot agree with Member Hunter that the unfair labor practice issue was presented to and considered by the arbitrator.8

2. The Administrative Law Judge also found that the labor dispute was restricted to the employees' dissatisfaction with the manner in which they were supervised by Corino, and he concluded that Bailey's letter was "just barely" within the ambit of the dispute. We agree with the General Counsel's exceptions on this issue, and we find that the labor dispute embraced a broader range of issues and that Bailey's letter was closely connected with those issues.

As noted above, Bailey, Giles, and other employees raised several problems with Corino soon after Respondent began its operations at Brookhaven. They complained that, unlike Brookhaven's management, Respondent was supplying them with weak cleaning solutions, and that consequently they had to rub harder to clean the sinks, toilet bowls, and bathtubs. The maids also objected to Respondent's requirement that they use soft bristle brushes to clean enamel surfaces, since Brookhaven had formerly supplied them with hard bristle brushes which had required less effort. Additionally, as found by the Administrative Law Judge, in May 1980 Corino informed the maids that they would subsequently be required to perform some of the porters' duties. In view of the foregoing, we see no reason to limit the focus of the labor dispute to the issue of Corino's supervision, and we find that there was an ongoing dispute encompassing a variety of issues involving the employees' working

We further find that Bailey's letter was directly related to the labor dispute, since it specifically in-

⁶ The Chairman does not explain why he finds it necessary to make this assumption, and why he goes to such great lengths here to find that the arbitrator actually considered and ruled upon the unfair labor practice issue. Since he has clearly stated his rejection of Suburban Motor Freight's requirement that the arbitrator consider the unfair labor practice issue, he presumably would defer even if it were affirmatively established to his satisfaction that the arbitrator did not consider that issue.

⁷ Suburban Motor Freight, supra; Yourga Trucking, Inc., 197 NLRB 928 (1972).

⁸ We reject Member Hunter's hyperbolic claim that the Board requires the unfair labor practice issue "must be litigated and decided in exactly the same manner as it would be before this Agency." We have found here that the statutory issue was not litigated at all. Other than in Spielberg itself, the Board has imposed no special rules concerning the manner in which such an issue can be litigated in arbitration proceedings.

dicated that Respondent had removed the cleaning agents supplied by Brookhaven and had replaced them with products which had proven ineffective. When viewed in this context, the letter's assertions that the facility is "deteriorating" and that "the floors are not really being cleaned" are clearly related to the employees' complaints about the type of cleaning products being utilized. Additionally, the letter specifically raises the issue involving Respondent's announcement that the maids would be required to perform the porters' work. Contrary to the Administrative Law Judge, therefore, we find that Bailey's letter was closely connected to the ongoing labor dispute.

3. The Administrative Law Judge also found that Bailey's letter reached the level of public disparagement necessary to have deprived her of the protection of the Act. In agreement with the General Counsel's exceptions, we find that Bailey's conduct was protected and that Respondent violated Section 8(a)(1) of the Act by discharging her for that conduct.

The Board has traditionally been careful to distinguish between disparagement of an employer's product and the airing of what may be highly sensitive issues. We have observed that "absent a malicious motive, [an employee's] right to appeal to the public is not dependent on the sensitivity of [an employer] to his choice of forum." After a careful analysis of Bailey's letter and the record as a whole, we find no evidence of a deliberate intent on Bailey's part to disparage Respondent's product or to undermine its reputation.

In conjunction with the complaints about the cleaning solution and the announced reassignment of the porters' work, the letter sets forth several allegations concerning a decline in service, noting in particular that the facility is "deteriorating," that Respondent has "done nothing to enhance the interior of [the] facility," and that "the floors are not really being cleaned." The letter also instructed Rothman to "take a good long look at what [Respondent] is doing to your facility." We find that these comments are similar to those which we found protected in Richboro, supra, where an employee distributed a letter which referred to a "decline in service" and "a decrease in the quantity and quality of service" to his employer's clients. The Board found these statements to be clearly distinguishable from disparaging comments which are "calculated to alienate the public's patronage as a tactic to increase the employees' leverage in the

labor dispute."11 As in Richboro, we find that the purpose of the letter was not to injure Respondent by impugning its operation. On the contrary, by urging Rothman to take a "good long look" at the facility and by stating that it was their duty to inform him of the situation "before it is too late," Bailey and the other employees demonstrated that their purpose was to encourage Rothman to remedy the various problems they were encountering in their working conditions. Neither the letter nor the record as a whole provides any support for the Administrative Law Judge's finding that Bailey's intent was to have Brookhaven immediately cancel its contract with Respondent. 12 We further find, as we did in Richboro, that, while the letter was highly critical of Respondent's operation, its tone cannot be described as malicious 13

We therefore conclude that, although the letter raised "delicate issues which Respondent would understandably prefer to keep out of the public eye," 14 it was not of such a character as to deprive Bailey of the protections of the Act. Accordingly, we find that Respondent violated Section 8(a)(1) of the Act by discharging Margaret Bailey because of the letter which she wrote to Brookhaven on June 23, 1980.15

THE REMEDY

Having found that Respondent interfered with, restrained, and coerced Margaret Bailey in the exercise of her Section 7 rights by discharging her on or about July 9, 1980, we shall order that Respondent cease and desist therefrom and take certain actions intended to effectuate the policies of the Act. We shall order Respondent to offer Margaret Bailey immediate and full reinstatement to her former position or, if that position no longer exists, to a substantially equivalent position, without prejudice to her seniority or other rights and privileges previously enjoyed, and to make her whole for any

⁹ Allied Aviation Service Company of New Jersey, Inc., 248 NLRB 229 (1980).

¹⁰ Richboro Community Mental Health Council. Inc., 242 NLRB 1267, 1268 (1979).

^{11 242} NLRB at 1268, citing N.L.R.B. v. Local Union No. 1229, International Brotherhood of Electrical Workers, A.F.L. [Jefferson Standard Broadcasting Company], 346 U.S. 464, 476-477 (1953).

¹² In finding that Bailey's purpose was to have the contract canceled, the Administrative Law Judge relied in part on his finding that the complaints contained in the letter lacked merit. It is well settled, however, that the truth or falsity of a communication is not material and is not the test of its protected character. Tyler Business Services, Inc., 256 NLRB 567, 568 (1981); The Patterson-Sargent Company, 115 NLRB 1627, 1629 (1986)

¹³ Contrary to the Administrative Law Judge, we find that the letter's tone did not exceed that of the questionnaire circulated by an employee in *American Arbitration Association. Inc.*, 233 NLRB 71 (1977). In that case the Board adopted an Administrative Law Judge's finding that the employee had ridiculed that employer and had purposely tried to embarrass the employer by juxtaposing its client with various animals.

¹⁴ Allied Aviation Service Company of New Jersey, Inc., supra at 231.

¹⁵ We find it unnecessary to reach the General Counsel's contention that the discharge also violated Sec. 8(a)(3) of the Act, since the remedy would be the same in any event.

loss of earnings she may have suffered as a result of her unlawful discharge, with backpay to be computed in the manner set forth in F. W. Woolworth Company, 90 NLRB 289 (1950), and with interest to be computed in the manner set forth in Florida Steel Corporation, 231 NLRB 651 (1977).¹⁶

We shall also add the affirmative requirement that Respondent expunge from its records any reference to the unlawful discharge of Margaret Bailey. Respondent shall also be required to provide written notice of such expunction to Margaret Bailey, and to inform her that Respondent's unlawful conduct will not be used as a basis for future personnel actions concerning her. See Sterling Sugars, Inc., 261 NLRB 472 (1982).

CONCLUSIONS OF LAW

- 1. Professional Porter & Window Cleaning Co., Division of Propoco, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
- 2. Local 144, Hotel, Hospital, Nursing Home, Allied Health Services Union, Service Employees International Union, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.
- 3. By discharging employee Margaret Bailey because of her protected concerted activities, Respondent has engaged in an unfair labor practice within the meaning of Section 8(a)(1) of the Act.
- 4. The aforesaid unfair labor practice is an unfair labor practice affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Professional Porter & Window Cleaning Co., Division of Propoco, Inc., Lynbrook, New York, its officers, agents, successors, and assigns, shall:

- 1. Cease and desist from:
- (a) Discharging employees because of their protected concerted activities.
- (b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them in Section 7 of the Act.
- 2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

- (a) Offer Margaret Bailey immediate and full reinstatement to her former position or, if that position no longer exists, to a substantially equivalent position, without prejudice to her seniority or other rights and privileges previously enjoyed, and make her whole for any loss of earnings she may have suffered as a result of her unlawful discharge, as provided in the section of this Decision entitled "The Remedy."
- (b) Expunge from its files any reference to the unlawful discharge of Margaret Bailey, and notify her, in writing, that this has been done and that evidence of the unlawful discharge will not be used as a basis for future personnel actions concerning her.
- (c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.
- (d) Post at its Lynbrook, New York, facility, and, with Brookhaven's consent, at the Brookhaven Beach Health Related Facility, copies of the attached notice marked "Appendix." Copies of said notice, on forms provided by the Regional Director for Region 29, after being duly signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.
- (e) Notify the Regional Director for Region 29, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

CHAIRMAN VAN DE WATER, dissenting:

I agree with the Administrative Law Judge that this case should be deferred to the arbitrator's award upholding the discharge of Margaret Bailey and that, accordingly, the complaint should be dismissed in its entirety.

Employee Bailey worked as a maid for Respondent, which performed cleaning and maintenance services for Brookhaven nursing home. In June 1980, Bailey prepared and signed a letter to Brook-

¹⁸ See, generally, Isis Plumbing & Heating Co., 138 NLRB 716 (1962). In accordance with his dissent in Olympic Medical Corporation, 250 NLRB 146 (1980), Member Jenkins would award interest on the backpay due based on the formula set forth therein.

¹⁷ In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

haven critical of Respondent's cleaning services. The letter, which is fully set out in the majority's decision, stated in part that "this facility is deteriorating" and that Respondent "has done nothing to enhance the interior of this facility." Bailey persuaded nine other employees to sign the letter and presented it to Brookhaven's administrator. Respondent was upset. Meetings were held and the Union persuaded Respondent to forgo any disciplinary action if Bailey would apologize and write a retraction letter. Bailey refused, was discharged, and filed a grievance protesting her discharge.

Bailey's grievance was taken to arbitration where she appeared with counsel and gave evidence. Bailey contended before the arbitrator that she was terminated because she would not apologize and that the charges in her letter were true. The Board's unfair labor practice complaint was brought to the attention of the arbitrator. However, as found by the arbitrator, Bailey "did not mention or was it even suggested in her presentation, that she was discharged because she had 'joined or assisted the Union' or had 'engaged in other concerted activity for the purpose of collective bargaining." Additional evidence presented to the arbitrator includes the facts that the contract between Brookhaven and Respondent provided for cancellation should Respondent fail to adequately perform its cleaning functions, that state inspectors gave Respondent a "very good" rating, and that it was established at meetings with the Union and the housekeeping staff that Bailey's charges were entirely unwarranted.

The arbitrator found that Respondent had just cause to discharge Bailey. He concluded that Bailey's actions were "akin to extreme insubordination" and that since Bailey made "libelous charges against her employer . . . she must be ready to prove their validity or suffer the penalty of dismissal." The arbitrator found that Bailey "herself destroyed the entire fabric of an acceptable Employer-Employee ralationship." The arbitrator stated, "[O]f course this NLRB Complaint is not before me for determination," and "I FIND that her discharge was caused not because of any Union activity or other activity protected by the NLRB, as amended, but because of her misconduct herein before discussed revolving around her letter of complaint of June 23, 1980, and her refusal to retract when given the opportunity on the Union's intercession which, if taken, would have saved Grievant her job."

I would defer because the arbitration proceeding and award meet the standards for deferral set by Spielberg Manufacturing Company, 112 NLRB 1080 (1955). The proceeding appears to have been fair and regular, all parties agreed to be bound, and the decision of the arbitrator is not clearly repugnant to the purposes and policies of the Act. My decision to defer does not mean I necessarily agree with the arbitrator's award; I am deferring to the award, not adopting it. I believe that a sound deferral policy requires a return to the broad deferral standards of *Spielberg* and not the restrictive standards followed by the majority.

Although the Board has waxed and waned in the application of broad deferral standards almost as regularly as the appointment of new Board Members, the changes are not mechanical but reflect the difficulty of resolving inherent tensions in the Act—the tensions between the public policy favoring arbitration of labor disputes and the Board's exclusive jurisdiction to find unfair labor practices, between the purpose of the Act to foster collective bargaining and its purpose to protect individual Section 7 rights, and between the Board's administrative responsibility to clearly define national labor relations policy and its adjudicatory responsibility to decide cases. A broad deferral policy advances the policy favoring arbitration, fosters collective bargaining, and fulfills the Board's administrative responsibilities. At the same time, deferral under Spielberg standards preserves the other functions of the Board by ensuring that statutory rights are not abused by arbitration. The propriety of deferral to resolve the tensions in the Act is discussed in N.L.R.B. v. Pincus Brothers, Inc.-Maxwell, 620 F.2d 367 (3d Cir. 1980), 18 especially in Judge Garth's concurrence. Deferral pursuant to Spielberg is a reasonable exercise of the Board's discretion to decline to decide the merits of a case in order to serve the fundamental aims of the Act and to further national policy.

The national policy favoring the settlement of labor disputes through grievance arbitration was declared by Congress in Section 203 (d) of the LMRA which states:

Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement.

Affirmation of this policy was given by the Supreme Court in the Steelworkers Trilogy. 19 In

¹⁸ The court held that the Board abused its discretion in declining to defer and denied enforcement of the Board's decisions, 237 NLRB 1063 (1978) and 241 NLRB 805 (1979).

¹⁹ United Steelworkers of America v. American Manufacturing Co., 363 U.S. 564 (1960); United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960).

American Manufacturing, at 567, the Court stated, "Arbitration is a stabilizing influence only as it serves as a vehicle for handling any and all disputes that arise under the agreement." In Warrior & Gulf, at 578, the Court stated, "A major factor in achieving industrial peace is the inclusion of a provision for arbitration of grievances in the collective bargaining agreement," and, at 581, "The grievance procedure is, in other words, a part of the continuous collective bargaining process." And in Enterprise Wheel & Car, at 596, the Court stated, "The refusal of courts to review the merits of an arbitration award is the proper approach to arbitration under collective bargaining agreements." In subsequent cases the Court has continued to stress the strong national policy favoring arbitration of labor disputes. For example, in Boys Markets, Inc. v. Retail Clerks Union, Local 770, 398 U.S. 235, 251 (1970), the Court endorsed arbitration and other "administrative techniques for the peaceful resolution of industrial disputes," and in Gateway Coal Co. v. United Mine Workers of America, et. al., 414 U.S. 368, 377 (1974), the Court stated, "The federal policy favoring arbitration of labor disputes is firmly grounded in congressional command," and found that policy applicable to labor disputes touching the safety of employees. Although these cases do not apply directly to the Board and there is no statutory or Court mandate for the Board to adopt a broad deferral policy, these cases are "healthy hints" 20 that the Board should follow such a policy.

In International Harvester Company (Indianapolis Works), 138 NLRB 923 (1962), affd. sub nom. Ramsey v. N.L.R.B., 327 F.2d 784 (7th Cir. 1964), cert. denied 377 U.S. 1003, the Board specifically found that the policies announced by the Court in the Steelworkers Trilogy apply to Spielberg deferral. The Board in deferring stated, at 926:

The Act, as has repeatedly been stated, is primarily designed to promote industrial peace and stability by encouraging the practice and procedure of collective bargaining. Experience has demonstrated that collective-bargaining agreements that provide for final and binding arbitration of grievance and disputes arising thereunder, "as a substitute for industrial strife," contribute significantly to the attainment of this statutory objective.

In Carey v. Westinghouse Electric Corp., 375 U.S. 261, 271 (1964), the Supreme Court quoted with obvious approval the above statement of the Board. By adopting a broadly based deferral

policy, the Board endorses the national policy favoring arbitration and also achieves the primary objective of the Act—to encourage collective bargaining. On the other hand, as stated in Associated Press v. N.L.R.B., 492 F.2d 662, 667 (D.C. Cir. 1974),²¹ "We think it clear that submission to grievance and arbitration proceedings of disputes which might involve unfair labor practices would be substantially discouraged if the disputants thought the Board would give de novo consideration to the issue which the arbitrator might resolve."

A return to broad deferral standards would not be an abdication of the Board's responsibility to prevent unfair labor practices; the Spielberg criteria ensure otherwise. As found by the court in Associated Press, supra at 667, "The Board does not abdicate its responsibilities to implement the National Labor Relations Act by respecting peaceful resolution of disputes through voluntarily agreed upon administrative techniques as long as it is assured that those techniques are procedurally fair and that the resolution is not clearly inconsistent with or repugnant to the statute." The reason is that Spielberg resolves the inherent tensions in the Act by recognizing that the national policy favoring arbitration requires the Board to emphasize the major purpose of the Act to achieve industrial peace through collective bargaining. As stated by Judge Rosenn in the lead opinion in Pincus Brothers, 620 F.2d at 374, "The national policy in favor of labor arbitration recognizes that the societal rewards of arbitration outweigh a need for uniformity of result or a correct resolution of the dispute in every case." Deferral restricts multiple litigation of the same set of facts in different forums and prevents parties from freely ignoring their agreement to submit all their disputes to their grievance and arbitration procedures. Deferral recognizes that the parties have accepted the risk that an arbitrator might decide a particular set of facts differently than would the Board. However, this risk is one which the parties have voluntarily assumed through collective bargaining.²² As further stated by Judge Rosenn in

²⁰ N.L.R.B. v. The Horn & Hardart Company, 439 F.2d 674, 679 (2d Cir. 1971).

²¹ The court upheld the Board's decision to defer, 199 NLRB 1110 (1972).

²² Even though deferral arises only where the issues before the arbitrator also involve unfair labor practice issues, this risk is not always borne by the grievant. A refusal by the General Counsel to issue an unfair labor practice complaint on union-filed charges does not prohibit a court from ordering arbitration of the same matter or from enforcing an arbitration award upholding the union's charges. See International Union of Electrical, Radio and Machine Workers. AFL-ClO v. General Electric Company, 407 F. 2d 253 (2d Cir. 1968), cert. denied 395 U.S. 904 (1969); Edna H. Pagel, Inc., a California Corporation doing business as Sweetener Products Company, et al. v. Teamsters Local Union 595, chartered by the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, 667 F.2d 1275 (9th Cir. 1982).

Pincus Brothers, supra, "The parties are not injured by deference to arbitration because it is the parties themselves who have selected and agreed to be bound by the arbitration process." Deferral by the Board in any particular case is a determination that the broad policies of the Act should take precedence over a decision by the Board on the merits of the case. In this sense, deferral is an assertion of jurisdiction by the Board in which it recognizes both the very real role arbitration plays in the bargaining process and the parties' agreement to submit their dispute to the arbitral forum.

It is these policy considerations which lead me to conclude that a broad deferral policy is necessary if the Board is properly to fulfill its statutory mandate. Once the Board has decided to exercise its discretion to defer, the Board must clearly define its criteria for deferral so employers, unions, and employees know what to expect and so the Regional Offices know when to issue unfair labor practice complaints. I believe that the Spielberg standards for deferral are sufficiently broad and, if narrowly defined, are sufficiently clear. The Spielberg procedural standards, that the parties have agreed to be bound and that the proceedings appear to be fair, have not been difficult to apply; essentially they mean that the proceedings have not been arbitrary and capricious. The substantive standard, that the result is not clearly repugnant to the purposes and policies of the Act, has proved difficult to apply. However, the difficulty is due not to the lack of clarity of the standard but to the failure of the Board to follow the broad deferral policy of that standard. In Liquor Salesmen's Union Local 2 of the State of New York, Distillery, Rectifying, Wine & Allied Workers' International Union, AFL-CIO [Chamber Industries, Inc., et al.] v. N.L.R.B., 664 F.2d 318, 323-324 (2d Cir. 1981),28 the court stated:

Over the years, the number and nature of the criteria applied to deference decisions have changed. The concept of "clearly repugnant," for example, has proved elusive, with the Board and the courts viewing it sometimes as a test of whether the arbitrator's award was "palpably wrong," see, e.g., International Harvester Co., 138 N.L.R.B. 923, 929 (1962), enf'd sub nom. Ramsey v. N.L.R.B., 327 F.2d 784 (7th Cir.), cert. denied, 377 U.S. 1003, 84 S.Ct. 1938, 12 L.Ed.2d 1052 (1964); or not "consistent with Board law," see, e.g., Kansas City Star, Inc., 236 N.L.R.B. 866, 869 (1978) (Member Truesdale, concurring); or "arguably

... not inconsistent with Board policy," see *NLRB* v. *Pincus Brothers, Inc.-Maxwell*, 620 F.2d 367 (3d Cir. 1980).

The term "clearly repugnant" has by ordinary definition a restrictive meaning and should, in my opinion, be restrictively defined and broadly applied. The key, I believe, is to be found in the standard courts are required to follow in deciding whether to order arbitration. In the Steelworkers Trilogy case of Warrior & Gulf, 363 U.S. at 582-583, the Supreme Court held, "An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage." This is the standard which I would apply, by the process of extrapolation, in defining "clearly repugnant." If an arbitration award is susceptible to an interpretation that is not inconsistent with the fundamental purposes or the specific provisions of the Act, the award is not clearly repugnant to the purposes and policies of the Act. This is the standard applied by the D.C. Circuit in Associated Press, 492 F.2d 662, and by the Ninth Circuit in Douglas Aircraft Company, a component of McDonnell Douglas Corporation v. N.L.R.B., 609 F.2d 352, 354-355 (1979),24 holding, "If the reasoning behind an award is susceptible of two interpretations, one permissible and one impermissible, it is simply not true that the award was 'clearly repugnant' to the Act." In Pincus Brothers, 620 F.2d at 374, the Third Circuit agreed, ruling, "[W]e conclude that it is an abuse of discretion for the Board to refuse to defer to an arbitration award where the findings of the arbitrator may arguably be characterized as not inconsistent with Board policy." This is the "clearly repugnant" standard of Spielberg which I would apply.

In Suburban Motor Freight, Inc., 247 NLRB 146 (1980), the Board majority adopted the additional deferral standards that the statutory issue involved in the case must have been presented to and considered by the arbitrator. In my opinion, Suburban Motor Freight departs from sound deferral policy. The arbitral forum is the one selected through collective bargaining by the parties to resolve their disputes and once that forum has been invoked the grievant should be required to raise any statutory issues before the arbitrator or be precluded from subsequently raising them before the Board. The Suburban Motor Freight standards open the way for relitigation of issues resolved by the arbitrator

²⁸ The court held that the Board abused its discretion in declining to defer and denied enforcement of the Board's decision, 250 NLRB 293 (1980).

²⁴ The court held that the Board abused its discretion in declining to defer and denied enforcement of the Board's decision, 234 NLRB 578 (1978)

merely because the General Counsel argues or the Board discovers in hindsight some different facts, arguments, or legal theories. The standards lead to the Board's deciding whether or not to adopt the arbitrator's award. This, I submit, is not deferral and contravenes the public policy favoring grievance arbitration.

Once a statutory issue has been raised in an arbitral proceeding, the arbitrator must effectively resolve the issue just as the arbitrator must resolve all the issues before him. However, a written opinion, although desirable, is not required. See *Bloom* v. N.L.R.B., 603 F.2d 1015, 1020 (D.C. Cir. 1979).²⁵ Absent evidence to the contrary, the Board should be willing to assume that arbitrators have considered the issues presented to them, including any unfair labor practice issues. "[I]t should not be assumed that an arbitrator has snubbed the Act any more than that he has exceeded his authority." *Douglas Aircraft Company*, 609 F.2d at 355.

Even were I to agree in principle with Suburban Motor Freight, I would not add the additional standards because they lack clarity and are, therefore, administratively unsound. The Suburban Motor Freight standards do not resolve but create the problems of how thoroughly the statutory issue has to be presented and how completely the arbitrator has to consider the issue. The majority's application of Suburban Motor Freight in the instant proceeding illustrates the extent of these problems. Although the statutory issue was not specifically litigated and was not argued before the arbitrator, the issue was raised when the unfair labor practice complaint before the Board was introduced.²⁶ As the statutory issue was raised, as the issue involved an evidentiary question, and as the facts were fully presented, I would find that the statutory issue was presented to the arbitrator. In addition, I would find that the arbitrator considered and ruled on the unfair labor practice issue. Although the arbitrator found that the unfair labor practice complaint was not before him for determination, which strictly considered it could not be because the Board has exclusive jurisdiction over unfair labor practices, he specifically found that Bailey was not discharged because of activity protected by the Act. What more the majority would require I do not know. What is important is that Suburban Motor Freight, especially as applied by the majority, is administratively unsound and reflects an unsound deferral policy.

I would find that the arbitration award meets the Spielberg standards for deferral. There is no contention before the Board of procedural irregularity,²⁷ and in my opinion the award is not clearly repugnant to the purposes and policies of the Act. The arbitrator found that Bailey's drafting a letter critical of Respondent and giving the letter to a client of Respondent was "akin to supreme insubordination" and that she failed to prove the validity of the "libelous charges" in the letter. This award is susceptible to an interpretation that Bailey's actions amounted to disparagement and that any concerted activity was removed from the protection of the Act. Although the arbitrator did not use the term "disparagement," it is not unreasonable to interpret his award as effectively so finding. The Administrative Law Judge explains at length why this is so. The employees' real complaint was about their supervisor and was not set out in the letter, the letter was highly critical of the Respondent's ability to perform its cleaning function, and the letter was given to a client of Respondent. For these reasons, the arbitration award is susceptible to a permissible interpretation, especially as the arbitrator found that the statements in the letter were not true and that Respondent's cleaning contract was revocable for poor performance. Accordingly, deferral to the arbitration award is appropriate.

In many respects this case is similar to *Pincus* Brothers, Inc.-Maxwell, 237 NLRB 1063 and 241 NLRB 805. In that case an employee prepared and distributed to employees a leaflet which called the semiannual plant meeting a "circus," referred to "our already stinking pay checks," stated, "The way we have to work ain't no different from any other stinking garment shop in the city," and referred to the "lousy style of clothes" Pincus was making. The arbitrator held that the employee was discharged for cause because she had written a handbill which "intentionally misrepresented or distorted facts related to certain employment practices and business policies and product status of the Company in a denigrating, disparaging fashion so as to constitute detrimental unprotected disloyalty." The Board found that it would be repugnant to the Act to defer, noting that the handbill "was not distributed to the public but was aimed only at her fellow employees." The Third Circuit found that the Board abused its discretion in not deferring. N.L.R.B. v. Pincus Brothers, Inc.-Maxwell, 620 F.2d 367. Specifically, the court was of the opinion that the employee's activities were arguably unprotected because, among other reasons, the leaflet

³⁵ The court upheld the Board's decision to defer, *United Parcel Service, Inc.*, 232 NLRB 1114 (1977).

³⁶ Introducing the complaint for a limited purpose is akin to telling someone, "Don't think about a bear." The fact is that the complaint was before the arbitrator and the arbitrator would be remiss if he failed to

²⁷ The Administrative Law Judge categorically rejected the suggestion that Bailey was not given a fair opportunity to testify at the arbitration proceeding.

could at least arguably be labeled as "defamatory or insulting material known to be false" and thus characterized as unprotected and that the employee's conduct, in view of language of the leaflet and the arbitrator's view of the effect of that language, "could arguably be characterized as unprotected disloyalty." I believe the court's decision is clearly applicable to the instant case. Bailey's conduct could arguably be characterized as unprotected based on the arbitrator's finding that it was insubordinate, libelous, and destructive of the employeremployee relationship and that the letter was shown not only to employees but to a client of Respondent.

For the foregoing reasons I would defer to the arbitration award herein and dismiss the complaint in its entirety. In my opinion, the majority's decision not to defer is a rejection of *Spielberg* and the national policy favoring arbitration.

MEMBER HUNTER, dissenting:

Once again, my colleagues in the majority have substituted their judgment for that of an arbitrator, reaching out not only to overturn the arbitrator's award but also to reverse the Administrative Law Judge, who recommended deferral. I dissent.

The facts have been set out both in the majority opinion and in Chairman Van de Water's dissent, and I will not recount them again. Relying on Suburban Motor Freight, Inc.,28 the majority finds deferral inappropriate because "the unfair labor practice issue before us was neither presented to nor considered by the arbitrator." While I am not prepared to reject Suburban Motor Freight out-of-hand, it seems that the requirement that the arbitrator consider the unfair labor practice becomes more complex with each decision.29 From the present decision, it appears that, in order for the parties to have any degree of certainty that the Board will defer, the unfair labor practice must be litigated and decided in exactly the same manner as it would be before this Agency. That is, the arbitrator must make the exact same factual determinations and apply Board precedent in a written discussion which resolves the unfair labor practice precisely as the Board would. Clearly this approach extends the Raytheon requirement beyond any reasonable bounds, and in effect mandates turning arbitrators into de facto administrative law judges. I do not believe that such an elaborate standard is consistent with the strong national policy which favors voluntary arbitration of disputes. That policy is ably explained in the Chairman's dissent, and I agree wholeheartedly with his analysis of the importance of arbitration to the overall scheme of Federal labor law.

As noted earlier, I do not approve the majority's broad expansion of the Raytheon requirement. The standard I would apply is not necessarily new, but it is one which I believe comports with the approach used previously by the Board³⁰ and by several of the reviewing courts of appeals.³¹ I would find that the arbitrator had adequately considered the unfair labor practice if (1) the contractual issue is factually parallel to the unfair labor practice issue, and (2) it appears from the record that the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice. However, I would not require the arbitrator to pass explicitly on the unfair labor practice. 32 Such a requirement is, at best, anomalous, because arbitrators do not have the authority to decide unfair labor practices, and, at worst, a formalistic mechanism to avoid deferral because of the absence of "magic words."

In the instant case, I join the Chairman in deferring because the arbitrator's award here meets the standard set out above. Thus, the contractual issue of whether Respondent had "just cause" to discharge Bailey for her disparaging letter to Brookhaven is factually parallel to the unfair labor practice issue of whether Respondent violated Section 8(a)(1) of the Act by discharging Bailey for sending the letter to the contractor. And it is clear from the record that the arbitrator considered the facts

^{28 247} NLRB 146 (1980).

²⁹ This requirement is not new; it has existed since the Raytheon decision in 1963. Raytheon Company, 140 NLRB 883.

³⁰ The Board has generally not required arbitrators to pass explicitly on the unfair labor practice. Raytheon Company, supra (deferral inappropriate where arbitrator had not considered evidence relevant to the unfair labor practice); The Kansas City Star Company, 236 NLRB 866 (1978) (deferral appropriate where arbitrator made necessary factual findings and implicitly resolved the unfair labor practice): Atlantic Steel Company, 245 NLRB 814 (1979) (deferral appropriate where arbitrator made complete factual findings which were parallel to unfair labor practice). In fact, my colleagues' interpretation here of Suburban Motor Freight-that the arbitrator must apply Board standards and make specific findings about the unfair labor practice-does not even comport with the interpretation of at least one of the members of the majority in that decision. Thus, in Bay Shipbuilding Corporation, 251 NLRB 809, fn. 3 (1980), then Member Truesdale stated that "Suburban Motor Freight does not require that an arbitrator pass on the unfair labor practice explicitly." My agreement with Suburban Motor Freight is limited to its holding that deferral is unwarranted where the arbitrator is not presented with the evidence relevant to the unfair labor practice.

³¹ See, e.g., Liquor Salesmen's Union Local 2 of the State of New York, Distillery, Rectifying, Wine & Allied Workers' International Union, AFL-CIO [Charmer Industries, Inc., et al.] v. N.L.R.B., 664 F.2d 318, 325 (2d Cir. 1981) (deferral appropriate "[b]ecause both the contractual and statutory issues rest on the same factual determinations"). Under these circumstances, to insist here that the arbitrator announce that his resolution of the contractual dispute is intended as a resolution of the statutory issue as well is to impose a purely formalistic requirement. Bloom v. N.L.R.B., 603 F.2d 1015 (D.C. Cir. 1979) (deferral appropriate where the evidence presented to the panel was basically the same evidence later presented to the Board).

³² The legal standards under the contract and Board law normally are not precisely the same. But, in my view, consideration of the differing standards is, or should be, subsumed in the question of whether the arbitrator's decision is "clearly repugnant" to the Act.

relevant to the unfair labor practice in deciding that the discharge was for cause. In fact, he even made a finding that Bailey was not discharged for union or other protected activity.³³ I would therefore find that the arbitrator satisfied the requirement that he consider the unfair labor practice.

The only remaining question is whether the arbitrator's decision is "clearly repugnant" to the Act. The Administrative Law Judge concluded, after analyzing relevant Board precedent, that it was not. The majority, while claiming that it is not necessary to reach this question, spends considerable effort reversing the Administrative Law Judge and finding Bailey's letter to be protected activity for which she could not lawfully be discharged. On the issue of whether the arbitrator's award was clearly repugnant, I would adopt the findings of the Administrative Law Judge since I would not require an arbitrator's award to be consistent with the bulk of Board precedent. Instead, I would defer unless the award is "palpably wrong";34 i.e., it flys in the face of well-established and clear Board doctrine.35

I have not, given the posture of this case, analyzed my colleagues' decision on the merits in detail. Suffice it to say that the Administrative Law Judge found that Bailey's communication constituted a public disparagement and that the purpose of her letter was to persuade Brookhaven to cancel its contract with Respondent. The majority reverses the finding of public disparagement on the grounds that statements in the letter to the effect that the facility is "deteriorating" and "the floors are not really being cleaned" were similar to comments "which [the Board] found protected in Richboro, supra."36 In comparing statements, however, the majority omitted some of Bailey's more disparaging remarks; for example, her reference to "all the dirt and germs" at Brookhaven and her suggestion that

Respondent was merely making the floors look good without really getting them clean. These comments, as found by the Administrative Law Judge, were more serious than those found in Richboro. The assertion that dirt and germs were present is particularly damaging, since Brookhaven is a nursing home. Moreover, the letter, when read in its entirety, suggests that Respondent, either deliberately or negligently, had deceived Brookhaven by giving the appearance of cleaning the facility without doing so. I would conclude that the letter, taken as a whole, constitutes a public disparagement. I further agree with the Administrative Law Judge that the kind of language used, the lack of validity of the complaints, and the "intentional omission of any reference to the maids' dispute with [their supervisor]" support the inference that the purpose of the letter was not merely to air employee grievances to a third party, but rather to gain leverage with Respondent by convincing Brookhaven to consider canceling its contract.

This case is thus analogous to the Supreme Court's decision in Jefferson Standard Broadcasting Company, 37 a case relied on by the Administrative Law Judge in recommending deferral. In Jefferson Standard, the Court held that several employees were lawfully discharged for disloyalty when they distributed handbills during a labor dispute which made a "sharp, public, disparaging attack upon the quality of the company's product and its business policies, in a manner reasonably calculated to harm the company's reputation and reduce its income."38 The Court further noted that the disparagement "was not part of an appeal for support in the pending [labor] dispute."39 The Jefferson Standard decision is still the guiding precedent in the area of discharge for disloyalty, and the majority's attempt to distinguish it from the instant case is unpersuasive. Thus, as discussed above, the majority has ignored the plain language of the letter and instead has proffered the bald conclusion that the letter is not a "sharp, public, disparaging attack," but rather a simple "airing of . . . highly sensitive isues." The majority also finds that the letter does not omit reference to the real cause of the dispute since, contrary to the Administrative Law Judge, the majority finds that the maids were also concerned about the quality of the cleaning supplies, a subject discussed in the letter. I have already stated that I would adopt the findings of the

³⁸ The arbitrator here did more than 1 believe is necessary. He made a specific finding that Bailey was not discharged for union or other protected activity. The majority nevertheless rejects this finding as "gratuitous," even though the arbitrator reached this conclusion based on all the evidence before him, including the evidence of her alleged protected activity. Moreover, they suggest that an arbitrator must make a specific finding on disparagement or disloyalty and that this arbitrator's findings that Bailey's letter was "libelous" and her conduct "akin to extreme insubordination" were irrelevant to a determination of whether Bailey's activities were not protected by the Act. It is hard to imagine any arbitrator's decision which upholds the discharge as being satisfactory to the majority here. Indeed, it is clear from their reversal of the Administrative Law Judge that, at bottom, they simply disagree with the result.

³⁴ International Harvester Company (Indianapolis Works), 138 NLRB 923, 929 (1962), affd. sub nom. Ramsey v. N.L.R.B., 327 F.2d 784 (7th Cir. 1964), cert. denied 377 U.S. 1003, quoted in Member Penello's dissenting opinion in Douglas Aircraft Company, Component of McDonnell Douglas Corporation, 234 NLRB 578, 581 (1978), enforcement denied 609 F.2d 352 (9th Cir. 1979).

³⁶ I do not pass on the question of whether an arbitration's award must be in writing, since here the arbitrator issued a full decision.

³⁶ Richboro Community Mental Health Council, Inc., 242 NLRB 1267 (1979).

³¹ N.L.R.B. v. Local Union No. 1229. International Brotherhood of Electrical Workers [Jefferson Standard Broadcasting Company], 346 U.S. 464 (1953), affg. 94 NLRB 1507 (1951).

^{38 346} U.S. at 471.

³⁹ Id. at 477.

Administrative Law Judge,⁴⁰ in which he recognized that the maids had some concern about the cleaning supplies, but that their greater concern was the nature of their supervision.

Furthermore, even if the majority were correct in its conclusion that the letter was closely connected to the dispute, deferral would still be warranted here. As the Supreme Court stated in Jefferson Standard:

Even if the attack were to be treated, as the Board has not treated it, as a concerted activity wholly or partly within the scope of those mentioned in §7, the means used by the technicians . . . have deprived [them] of the protection of that section, when read in the light and context of the purpose of the Act. [346 U.S. at 477-478.]

Thus, it appears that the majority is reaching out in order to find a violation. This result is particularly inappropriate in the Spielberg context⁴¹ because it completely undermines that part of the Spielberg doctrine which states that the Board will defer even where it would not reach the same result if it considered the case de novo. In my view, the decisions of the arbitrator and the Administrative Law Judge are more consistent with the Jefferson Standard decision than is the result reached by the majority today. For all of the reasons stated above, I therefore dissent.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT discharge employees because of their protected concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them in Section 7 of the Act.

WE WILL offer Margaret Bailey immediate and full reinstatement to her former position or, if that position no longer exists, to a substantially equivalent position, without prejudice to her seniority or other rights and privileges previously enjoyed, and WE WILL make her whole for any loss of earnings she may have suffered as a result of her unlawful discharge, with interest.

WE WILL expunge from our files any reference to the discharge of Margaret Bailey, and notify her, in writing, that this has been done and that evidence of the unlawful discharge will not be used as a basis for future personnel actions concerning her.

PROFESSIONAL PORTER & WINDOW CLEANING CO., DIVISION OF PROPOCO, INC.

DECISION

STATEMENT OF THE CASE

JAMES F. MORTON, Administrative Law Judge: The hearing in this case was held in New York, on April 2 and 3, 1981. The underlying unfair labor practice charge was filed by Margaret Bailey on July 10, 1980. The complaint was issued on August 22, 1980, by the General Counsel against Professional Porter & Window Cleaning Co., Division of Propoco, Inc. (herein called Respondent) which filed its answer on September 2, 1980.

The issues submitted to me for decision in this case are:

- 1. Whether an arbitration award requires dismissal of the allegation by the General Counsel that Respondent violated Section 8(a)(1) and (3) of the National Labor Relations Act, as amended (herein called the Act), by having discharged its employee, Margaret Bailey, because of her activities on behalf of Local 144, Hotel, Hospital, Nursing Home, Allied Health Services Union, S.E.I.U., AFL-CIO (herein called the Union).
- 2. Whether her actions in preparing and signing a letter, and in obtaining the signatures of some of her coworkers thereon, were protected by Section 7 of the Act, such that her discharge therefor constituted a violation of Section 8(a)(1) and (3) of the Act.
- 3. Whether Respondent lawfully discharged Bailey because she, notwithstanding the advice of her union representative to do so, failed or refused to acknowledge by a written apology that the contents of that letter were clearly erroneous.

Upon the entire record, including my observation of the demeanor of the witnesses, and after careful consideration of the briefs filed by the General Counsel and by Respondent, I make the following:

FINDINGS OF FACT

I. RESPONDENT'S OPERATIONS AND THE UNION'S STATUS

Based upon the pleadings, I find that Respondent is an employer within the meaning of Section 2(2) of the Act and that it is engaged in commerce within the meaning of Section 2(6) and (7) of the Act. I further find, also based upon the pleadings, that the Union is a labor organization as defined in Section 2(5) of the Act.

⁴⁰ Acceptance of his findings seems particularly appropriate since they were based largely on his crediting of the witnesses' testimony. For example, his finding that the purpose of the letter was to protest supervision was based on the testimony of Giles and, indirectly, Bailey. Certainly, demeanor, as well as the words used, played a part in his determination.

⁴¹ Spielberg Manufacturing Company, 112 NLRB 1080 (1955).

II. THE ALLEGED UNFAIR LABOR PRACTICE

A. The Events Leading to Bailey's Discharge

There is virtually no factual issue posed in this case. Brookhaven Beach Health Related Facility (herein called Brookhaven) operates a nursing home in Far Rockaway, New York. Prior to about June 1979, it had on its own payroll a group of employees classified as maids and porters whose jobs were to keep clean the bathrooms, patients' rooms, hallways, and recreational areas of the nursing home. These employees were represented by the Union.

Respondent is engaged in the business of providing cleaning services to nursing homes and to commercial offices. In June 1979, Brookhaven subcontracted to Respondent the cleaning services then being done by Brookhaven's own maids and porters, as recounted in the preceding paragraph. Most of the maids and porters on Brookhaven's payroll then became employees of Respondent and they continued to work at the Brookhaven facility. As the Union had a contract also with Respondent, these maids and porters continued to be represented by the Union.

An individual, Mary Ann Corino, had been employed in the dietary department by Brookhaven. When Respondent obtained its contract with Brookhaven to do the cleaning work at its nursing home, it hired Corino to supervise its maids and porters there. The General Counsel's witnesses Margaret Bailey and Mary Giles testified that they were employed as maids by Respondent at Brookhaven and that they and other maids complained to Corino in 1979 that Respondent was supplying them with weak cleaning solutions. They testified that, as a consequence, the maids had to rub harder to get the sinks, toilet bowls, and bathtubs as clean as those facilities were when the maids worked directly for Brookhaven. They stated that Brookhaven had supplied a more effective cleaning agent. In addition, they testified that Respondent required them to use soft bristle brushes to clean the enamel surfaces of those facilities whereas Brookhaven had furnished them with hard bristle brushes to do that work. They testified that the hard bristle brushes required them to use considerably less effort than the soft bristle brushes did. Respondent's witness testified that the hard bristle brushes damaged the ceramic finish on the bowls and bathtubs and that the soft bristle brushes it furnished were equally effective in performing the normal cleaning duties. One of the General Counsel's witnesses, Mary Giles, testified that the last time, prior to the date on which Bailey circulated the letter discussed below, that the maids complained to Corino about having been furnished with ineffective cleaning fluids by Respondent was in November 1979. Respondent's assistant director of operations, Donald O'Toole, testified that the fluids met the express germicidal requirements of the health law of the State of New York and that the ammonia-brand detergent that had been used by Brookhaven as a cleansing agent before Respondent assumed the cleaning operations at Brookhaven in mid-1979 was completely ineffective.

It appears that Respondent's supervisor, Corino, conducted rigid inspections of the work performed by the

maids employed by Respondent at Brookhaven. In that regard, Bailey testified that Corino "stood over" the maids while they worked and that she was "always on the floor." Bailey testified that Corino criticized the maids as if they were little children. The General Counsel's other witness, Mary Giles, testified that Corino had complained about the way she did her work and, on one occasion, told her that she was not doing the dusting of window sills correctly. As a consequence of the pressures they felt were attributable to Corino's way of dealing with them, Bailey and Giles, together with some of the other maids, complained to their union steward and also to their union representative, McQueen. It appears that McQueen, on those occasions, talked with Corino and, according to Bailey, Corino would, as a result, let up the pressure for a few days and then, "it would start over again."

In May 1980, Corino met with the maids and told them that, as they get the same rate of pay as the porters and as they have the same job duties as the porters under the union contract, they would be expected to mop the bathroom floors. The maids protested to their union representative that the mops were too heavy for them and that they should not be expected to do the mopping or other heavy work done by the porters. The Union's representative told them that the contract does not make any distinction as to duties or pay based on whether a housekeeping employee is male or female and that the duties of a maid and a porter are interchangeable. Nevertheless, all witnesses agreed that the porters do the heavy work and that the only change in the maids' duties, relative to the time they worked for Brookhaven directly, is that on occasion the maids remove plastic bags containing discarded items. There is no evidence or contention that the removal of these bags is in any way unduly onerous for the maids to perform. The evidence is uncontroverted that, despite the testimony as to Corino's statement to the maids in May 1980 that they should mop the bathroom floors, the maids have never been required to do so.

The one thread that runs throughout the relevant time frame in this case is that the maids were upset with the manner in which Corino supervised them. As noted above, both of the General Counsel's witnesses, Bailey and Giles, asserted that Corino surveyed the work of the maids critically. On June 23, 1980, Bailey prepared and signed the letter set out below and gave it to some of the other maids, who also signed. Bailey said the letter was prepared by her after she and Giles agreed that perhaps the letter would bring about an arrangement whereby "there wouldn't be any hassles or anything." Giles stated that she signed the letter "to make her job better because if [the maids weren't] cleaning, Corino would come upstairs and harass [them]." Giles also testified that she signed the June 23 letter because "it was not aimed at anyone in particular." I infer from that testimony that she meant simply that she signed the letter because it did not make any direct reference to Corino. Her other testimony discloses, nevertheless, that the underlying reason why the letter was prepared and signed "was the way Corino treated the maids."

On June 23, 1980, Bailey handed the letter to H. Rothman, the administrator of Brookhaven who had, in mid-1979, subcontracted the housecleaning operations to Respondent. That letter reads as follows:

The Housekeeping Dept. feels that it is time for you to be made conscious of the fact that this facility is deteriorating.

The Professional Porter Service Company has done nothing to enhance the interior of this facility.

The Professional Porter Service Company has taken everything away from the Housekeeping Dept. that is needed to clean the facility with. The products that are used now have been diluted with so much water that [they are] no good.

The Professional Porter Service Company is making the hallways, the dining area, and the dayroom floors look good, but the floors are not really being cleaned.

Now on top of all the dirt and the germs, Professional Porter Service Company is demanding that the maids do the porter's work, and the porters do the maid's work.

Mr. Rothman, this is very humiliating to the Housekeeping Dept. and to the facility. So when you are in the facility again, just take a good long look at what the Professional Porter Service Company is doing to your facility.

Again, we feel that it is our duty to inform you of the situation before it is too late.

The letter was signed by Bailey, Giles, and eight other maids. Bailey asked Rothman to read the letter and then to meet with the maids. Instead, Rothman, after having read the letter, telephoned Respondent's president and told him that he did not want to get involved in any internal dispute Respondent had with its employees and that if Respondent could not take care of its own affairs, he would replace Respondent with a company that can do so. Respondent then, through its president and other agents, including Corino, and by using the offices of the Union, sought without success to have Bailey apologize in writing for the letter. When Bailey declined to do so, she was discharged.

B. The Arbitration Award

Bailey filed a grievance with the Union protesting her discharge. It went to hearing before an arbitrator. The Union's attorney in that proceeding testified in the instant case that he did not contend and thus offered no evidence in the course of the arbitration hearing that Bailey's discharge was based upon her activities on behalf of the Union. It appears that his sole contention before the

arbitrator was that Respondent did not have just cause to have discharged Bailey, particularly as the other maids, who signed the June 23 letter, were not disciplined. He acknowledged that he offered in evidence at the arbitration proceeding a copy of the complaint issued by the General Counsel in the instant case. He testified before me that he had introduced that complaint before the arbitrator solely to offset any inference that might be drawn by the arbitrator from the fact that Respondent had given to the arbitrator a copy of a determination by the Division of Unemployment Compensation of the State of New York that Bailey's discharge was for cause.

The arbitrator issued an award on December 23, 1980, finding that the Respondent had just cause to terminate Bailey as, in his view, Bailey's conduct in promulgating the June 23 letter was "akin to extreme insubordination" and that, as the "libelous charges" she made therein were not substantiated by her, she "must be ready to . . . suffer the penalty of dismissal . . . " He further noted in his award that she had, "by doing what she did and then refusing to acknowledge her error . . . destroyed the entire fabric of an acceptable Employer-Employee relationship." In his award, the arbitrator also observed that the "NLRB Complaint is not before [him] for determination." Nevertheless, he made an express finding that Bailey's discharge was not due to "any union activity or other activity protected by the NLRB."

C. Analysis

The testimony of the General Counsel's witness, Mary Giles, establishes directly that the reason the June 23 letter was drawn up, signed, and delivered to the administrator of the Brookhaven facility was to protest the way Respondent's supervisor, Corino, treated the maids.² Her testimony also clearly indicates that any reference to Corino was purposely omitted from that letter and that the maids hoped that the letter would result in an arrangement whereby they would be free of her supervision. The June 23 letter directly attacks Respondent's competence. The specific instances cited therein to support that view are not substantial when considered in context with other facts. Thus, the letter refers to products used by Respondent that were "no good"; the evidence indicates that the last time prior to the June 23, 1980, letter that the maids commented as to those products was in 1979. Again, the letter states that Respondent is demanding that the maids do the same work as the porters do. The fact is that Corino had told the maids a month prior to that letter that they would be expected to mop the floor, a job the porters have done. It is also a fact that they were never assigned to do that work. The letter ends with a statement that Brookhaven is being given a timely warning of Respondent's incompetence.

¹ During the hearing in the instant case, Bailey testified that she was not able to testify fully at the arbitration hearing to the events surrounding her discharge because the Union's attorney had instructed her not to say anything against the Union. The Union's attorney at that proceeding was notified of that contention and came promptly to the hearing room where he recounted the nature of the guidance he had given Bailey in preparing her for the arbitration proceedings. His testimony was most clear and forthright. It establishes that Bailey was given appropriate guidelines respecting the issue being considered by the arbitrator. The General Counsel does not contend and there is no evidence that Bailey

was in any way denied procedural due process respecting the arbitration hearing. The suggestion by her at the hearing before me that she was not given a fair opportunity to testify at the arbitration proceeding has no factual basis to support it.

² The testimony of Bailey, the Charging Party, indirectly discloses the same reason; she testified that the letter would result in there being no "hassles or anything" and that Corino had always "stood over" the maids.

There is no evidence that the Brookhaven administrator was asked to assist the maids in their efforts to get Corino to supervise them in a manner they would find more acceptable to them, notwithstanding that that was the reason the letter was sent, according to Mary Giles. The evidence also reveals that the Brookhaven administrator did not accept Bailey's invitation to meet with the maids. Instead, his complaints to Respondent led to Bailey's discharge.

The essential issue to be decided in this case is whether Bailey's activities (a) in preparing, signing, and inducing other maids to sign the June 23 letter, (b) in giving that letter to the Brookhaven's administrator, and (c) in refusing to apologize for the contents of that letter, are protected by Section 7 of the Act. If so, the arbitration award must fall as it would not be consonant with the policies of the Act.³ If her activities respecting that letter are not protected by Section 7, the complaint must be dismissed as the Board would then defer to the arbitration award.⁴

The Board has held that an employee may properly communicate with a third party in an effort to obtain the third party's assistance in circumstances where the communication was related to a legitimate, ongoing labor dispute between the employees and their employer, and where the communication did not constitute a disparagement or vilification of the employer's product or its reputation.⁵

In that case, the Board observed that the contours of the ongoing labor dispute must not be delineated in too restrictive a fashion and it discussed two of its earlier holdings thereon.⁶ In each of those two cases, a statement by employees critical of the level of patient care was held to be "a part of and related to the ongoing labor dispute." I am satisfied that Bailey's actions in drafting the June 23 letter, obtaining coworkers' signatures thereon and giving it to Rothman with a request for a meeting with him, establish that the communication was related to the dissatisfaction of the maids with the manner in which Corino supervised them and thus was related to a legitimate ongoing dispute.⁷

Having found that the June 23 letter was so related, the remaining issue to be considered is whether the letter can properly be viewed as a public disparagement of Respondent's services or an undermining of its reputation.8 The first consideration respecting that point involves a procedural question. Counsel for the General Counsel has urged that the criticisms of Respondent as set out in the June 23 letter were valid and were related to the maids' working conditions. He endeavored to support those contentions by offering extensive testimony as to the efficacy of the cleansing agents used by Respondent and the effect the use of soft brushes had on the efforts expended by the maids. Counsel for Respondent disputed those contentions and also urged me to follow the findings of the arbitrator that the contents of the June 23 letter were false, defamatory, unrelated to legitimate union activity, and unprotected. The Board has declined to date to hold that it is bound by the findings of fact made by an impartial arbitrator and instead it has indicated that a complete record should be made at the unfair labor practice hearing.9 It thus appears that it is incumbent on me to resolve the issues as to the efficacy of Respondent's cleaning methods and the merits of the assertions in the June 23 hearing on the maids' working conditions. The evidence is clear that substantial time lapses existed between the last complaints by the maids respecting certain of the matters set out in the June 23 letter and the date of the letter itself,10 and that the real but unstated purpose of the letter was somehow for the maids to be free of the supervisory methods used by Corino. It thus seems that Bailey was grasping for reasons to conceal the true purpose of the June 23 letter. In view of this and of the unpersuasive tenor of the testimony submitted by Bailey respecting the bases of the complaints set out in the June 23 letter, I find that there was no objective merit to those complaints and only an insignificant subjective interest in them on the part of the maids, as of June 23.

The Board has held that an employee loses the protection of Section 7 of the Act by publicly ridiculing her employer and thereby evidencing disloyalty to and disparagement of her employer's judgment and capacity to effectively perform its work.¹¹ Relevant to that determination is whether the employees disclosed in the statement the purpose of their appeal.¹²

The intentional omission of any reference to the maids' dispute with Corino in the letter, the lack of merit in the complaints voiced therein, the strident language in the letter of the many "deficiencies" in Respondent's services, and the ominous warning at the end of the letter in-

³ Spielberg Manufacturing Company, 112 NLRB 1080 (1955).

⁴ Ibid.

See Allied Aviation Service Company of New Jersey, Inc., 248 NLRB 229 (1980), and cases cited therein.

⁶ Richboro Community Mental Health Council Inc., 242 NLRB 1267 (1979), and Community Hospital of Roanoke Valley, Inc., 220 NLRB 217 (1975).

The Compare the holding in Firehouse Restaurant, 220 NLRB 818 (1975), where criticisms of the employer there by its employees were held to be unprotected by the Act as those criticisms were in furtherance of a private lawsuit and were not related to an ongoing labor dispute. In N.L.R.B. v. Local Union No. 1229, International Brotherhood of Electrical Workers, A.F.L., 346 U.S. 464 (1953), the majority opinion commented, respecting a leaflet distributed by some of the striking employees critical of the struck employer, that the coexistence of a labor dispute was a "fortuity." In that case the Court expressly noted the Board's finding that the leaflet was not part of an appeal for support in the then pending dispute. The facts in the instant case are sufficiently distinct from those in Firehouse Restaurant and in N.L.R.B. v. Local 1229 to bring the June 23 letter within the ambit of an ongoing labor dispute, but just barely. In drawing that conclusion, I am guided principally by the Board's admonition against being too restrictive in defining the contours of the labor dispute.

^{*} Allied Aviation Service Company of New Jersey, Inc., supra at 231, citing Veeder-Root Company, a Division of Western Pacific Industries, Inc., 237 NLRB 1175, 1177 (1978).

⁹ Pincus Brothers, Inc.,-Maxwell, 237 NLRB 1063 (1978); Dreis & Krump Manufacturing, Inc., 221 NLRB 309, fn. 1 (1975).

¹⁰ The maids last commented as to the cleansing agents in late 1979—over 6 months prior to the June 23 letter.

¹¹ American Arbitration Association. Inc., 233 NLRB 71 (1977). Therein, the Board referred to its holding in Jefferson Standard Broadcasting Company, 94 NLRB 1507 (1951), affd. sub nom. N.L.R.B. v. Local Union No. 1229, International Brotherhood of Electrical Workers, 346 U.S. 464 (1953), discussed above in fn. 7.

¹² Jefferson Standard Broadcasting Company, supra at 1511.

dicate that Bailey wanted Brookhaven to cancel its contract with Respondent forthwith and that it was not the intent of that letter to enlist the aid of Brookhaven in their efforts to have Corino change her method of supervising them. Bailey's denunciation of Respondent in the June 23 letter exceeded even the tone of the letter discussed in the American Arbitration Association case, supra, which letter was held not to be protected under Section 7 of the Act. Accordingly, I find that the June 23 letter reached the level of public disparagement necessary to have deprived Bailey of the protection of the Act. On that premise and as the arbitrator had considered the identical issue, I conclude that the arbitration award is consonant with the policies of the Act and in deference to it, the complaint should be dismissed. 13

CONCLUSIONS OF LAW

- 1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
- 2. The Union is a labor organization as defined in Section 2(5) of the Act.
- 3. The complaint herein must be dismissed as the identical issue was resolved by an arbitrator and his award is consonant with the policies of the Act.

[Recommended Order for dismissal omitted from publication.]

¹³ Respondent has urged that it discharged Bailey because she refused to apologize for writing the June 23 letter, and not because she wrote the

letter. While there is a distinction to be drawn, it is of an insignificant factual point which has no bearing on the essential issue as to whether or not the June 23 letter was protected.